

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO**

KEVIN KEITH,

Petitioner,

v.

LYNEAL WAINWRIGHT, WARDEN

Respondent.

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CASE NO. 1:18-cv-634

Judge Solomon Oliver, Jr.

Magistrate Judge Kathleen Burke

**WARDEN'S MOTION TO TRANSFER KEITH'S IMPROPERLY
FILED SUCCESSIVE HABEAS PETITION (ECF.1)
TO THE SIXTH CIRCUIT PURSUANT TO 28 U.S.C. §1631**

State prisoners seeking to file a second or successive petition, pursuant to 28 U.S.C. §2244(b)(3), must apply to the court of appeals for an order authorizing the district court to entertain the second or successive petition. *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997). Keith has failed to obtain permission from the court of appeals; therefore, this Court lacks the jurisdiction to adjudicate the petition. Consequently, this Court must transfer the case to the court of appeals for authorization. *Id.* The reasons for this request are fully set forth in the attached memorandum.

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General

/s/ *Brenda S. Leikala*

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MEMORANDUM

I. Introduction

In 1994, Keith was convicted of three counts of aggravated murder and three counts of attempted aggravated murder. He was sentenced to death. His convictions and sentence were affirmed on direct appeal. *State v. Keith*, 684 N.E.2d 47, 69 (Ohio 1997).

After exhausting his state remedies, Keith filed his initial habeas petition on September 3, 1999. *See Keith v. Mitchell*, N.D. Ohio Case No. 1:99-cv-657, Doc.11 (Economus, J.).¹ This Court denied relief and the Sixth Circuit affirmed. *Keith v. Mitchell*, 455 F.3d 662, 665 (6th Cir. 2006). On July 11, 2008, Keith filed a second-in-time habeas corpus petition. *Keith v. Bobby*, N.D. Case No. 1:08-cv-1687, ECF.1 (Economus, J.). Judge Economus transferred the case to the Sixth Circuit as a successive petition. *Keith v. Bobby*, N.D. Case No. 1:08-cv-1687, ECF.6. The Sixth Circuit denied Keith authorization to file a successive habeas petition. *Keith v. Bobby*, 551 F.3d 555 (6th Cir. 2009). Following that denial, Keith filed a motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e) asking the Court to reconsider its decision finding his numerically second petition to be a second or successive petition subject to the conditions of 28 U.S.C. § 2244(b)(2). *Keith v. Bobby*, N.D. Case No. 1:08-cv-1687, ECF.9. This Court denied Keith's Rule 59(e) Motion. *Keith v. Bobby*, N.D. Case No. 1:08-cv-1687, ECF.14. The Sixth Circuit affirmed the denial of the Rule 59(e) motion. *Keith v. Bobby*, 618 F.3d 594, 601 (6th Cir. 2010). On September 2, 2010, former Governor Strickland commuted Keith's sentence to life without parole.

On August 8, 2013, Keith filed a third habeas petition. *Keith v. LaRose*, N.D. Ohio Case No. 1:13-cv-1718, ECF.1 (Helmick, J.). Finding Keith's third petition to be successive,

¹ Early filings in the 1999 case predate electronic filing and will be denoted as Doc. ___ rather than ECF. ___.

Magistrate Judge Burke recommended the petition be transferred to the Sixth Circuit. *Keith v. LaRose*, N.D. Ohio Case No. 1:13-cv-1718, ECF.14. And on March 28, 2014, Judge Helmick adopted the Magistrate's decision and transferred the petition to the Sixth Circuit. *Keith v. LaRose*, N.D. Ohio Case No. 1:13-cv-1718, ECF.17. On December 8, 2014, the Sixth Circuit again denied authorization to file a successive habeas petition. *Keith v. LaRose*, 6th Cir. Case No. 14-3290, Doc.16-2.

Keith now files his **fourth** habeas petition in this Court. Because Keith again is attacking the same state court judgment as he attacked in his first habeas petition, this Court lacks jurisdiction to proceed and must transfer this case to the Sixth Circuit for authorization to proceed.

II. The Court should transfer the petition to the Sixth Circuit.

Title 28 U.S.C. §2244(b)(3)(A) provides that “[b]efore a second or successive application permitted by this section is filed in the district court, the applicant *shall* move in the appropriate court of appeals for an order authorizing the district court to consider the application.” §2244(b)(3)(A) (emphasis added). The United States Supreme Court has stated that a petition is successive if it is attacking the same judgment as a previous petition. *Magwood v. Patterson*, 130 S.Ct. 2788 (2010). The Sixth Circuit has held that where a second or successive petition is improperly filed with a district court, the petition should not be dismissed, but rather should be must be transferred to the Sixth Circuit. *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997).

Transfer is required here. As detailed above, this is now Keith's **fourth** habeas petition attacking the same state court judgment. Keith concedes he is attacking the same judgment. *See* Petition, ECF.1, PAGEID#:1. Moreover, in Keith's civil suit filed under 42 U.S.C. §1983, Keith acknowledged that he must seek authorization to file a successive habeas petition. *See Keith v. Yezzo, et. al.*, N.D. Case No. 1:18-cv-0047, ECF.1, PAGEID#:28, ¶164 (“Keith will be subjected

to the higher standard under 28 U.S.C. §2244(b) when he files again in federal court, *and will be required to first obtain authorization to file a successor habeas petition.*”) (emphasis added).

Despite telling this Court in another law suit that he knows the proper course that must be taken, Keith again filed his petition directly with this Court rather than seeking the proper approval from the Sixth Circuit. This Court lacks jurisdiction to proceed absent that authorization.

III. Conclusion

For these reasons, the Court must transfer Keith’s successive Petition for Writ of Habeas Corpus to the Sixth Circuit Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2018, a copy of the forgoing document was filed electronically. Notice of this filing has been sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

/s/ Brenda S. Leikala

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